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RADIUM AND THE AGE OF THE SUN

By GARRETT P. SERVISS.

A NEW PHASE of the discussion aroused by the wonderful properties of radium has just been opened by Professor George H. Darwin, best known as the son of the father of Darwinism, Darwin, and as a mathematician of great ability, who invented the tidal theory of the birth of the moon from the earth.

Prof. Darwin appeals to the newly discovered source of energy contained in atoms, and illustrated by the continual radiation given forth from radium and other substances, for a means of vastly prolonging the age and the future existence of the sun. Lord Kelvin many years ago calculated, upon the basis of the then known laws of matter and energy, that the sun could hardly have existed as a lightgiving body more than one hundred million years, and upon similar grounds the future duration of the sun has been estimated at not more than ten and possibly not more than five million years.

This, to be sure, would be ample time for the ripening of all present human schemes, but it is a brief period in astronomical reckoning, and one hardly likes to think of the sun as going out so soon.

But now comes Prof. Darwin with the very comforting assurance that the sun must be very much longer lived than we have hitherto supposed. Knowing, as we do, he says, that an atom of matter is capable of containing an enormous store of energy in itself we have no right to assume that the sun cannot liberate atomic energy to a degree at least comparable with what it would do if made of radium! And with this new light upon the subject he sees no reason to doubt the possibility of augmenting the estimate of the duration of the solar heat to ten or twenty times its present calculated value.

According to this view, we may regard the sun as having existed for at least one or two thousand million years and we can count upon its continuing to illuminate and warm the earth for one or two hundred million years yet to come.

The new view will commend itself to geologists and evolutionists who have always protested against the brevity of the sun's existence as heretofore calculated, because it did not afford sufficient time for the development of the existing species of animals and plants upon the earth from the exceedingly simple forms in which life appeared at the beginning. Now, however, when geological time, thanks to the hint given by radium, may be reasonably stretched out to ten or twenty times the former estimate of its length, the situation is changed, and the theory of evolution gains just what it wanted.

This is always the way in science. Some unexpected discovery is presently seen to strike the root of things apparently unconnected with it, and then, with a readjustment of theories to fit the new state of facts, there comes an advance all along the line. But this does not, in any sense, lessen the solidity of science; it simply proves that science is not a changeless rock, but a growing tree.

THE MILHISER CASE

Mr. Wm. L. Royal Replies to Mr. Jackson Guy.

Editor of The Times-Dispatch:

Sir,—Your issue of September 30th contains a critical review by Mr. Jackson Guy of the recent decision of our Court of Appeals in the case of Milhiser Manufacturing Co. vs. Gallego Mills Co., in which Mr. Guy refers to me as having published several notices in your paper proclaiming the decision to be one of the most important rendered in recent years, and as one worth millions of dollars to industrial enterprises.

Far be it from me to constitute myself the defender of the Court of Appeals. Its decisions are its defenders. But as the court permitted me to file a brief in that case, as it adopted the essential idea of that brief in its opinion, and as the case, in my judgment, is one of the most important to the people of Virginia ever decided by our Court of Appeals, I ask you to allow me space to say something in regard to it.

To appreciate the position that the Court of Appeals has taken in the Milhiser case, an historical review of the law relating to the subject is necessary.

The common law in its origin and early development grew out of rules suited to a semi-barbarous people, and, in its development, those who administered it insisted that it should move logically, in straight lines, from its source outwards. New conditions were to count for nothing. The lines were to be kept straight, and if the King's guardsman did not resemble the King's portrait of him, the King corrected the defect by painting the man to look like the portrait.

After awhile our ancestors began to grow out of their conditions of semi-barbarism, and then they began to see that rules running in straight lines out of sources that they had long departed from were entirely unsuited to their conditions, that had nothing whatever in common with the sources of the rules. This brought about our system of equity, jurisprudence, which was nothing but a contrivance for nullifying the operation of obsolete rules of law totally unsuited to the conditions that it was sought to apply them to.

Society made a great advance under the operation of this new force. But by degrees it grew into a system with fixed rules, and after a while it was seen that even this system failed to modify our old fixed rules of common law to the extent which still newer conditions demanded.

When this epoch was reached Lord Mansfield came to preside over the Court of King's Bench, and it was at once seen that the man and the hour had met. When I approach the scene of Lord Mansfield's administration of our laws, I feel that I am treading on sacred ground. No civil magistrate has ever performed the functions of his office so successfully and so gloriously as he.

What he did in the way of modifying and reforming the straight, barren and unyielding lines of the common law and suiting them to the needs of an expanding and progressive people has been worth ten thousand times as much to the English speaking people as all the acts of Parliament, acts of Congress and acts of Legislatures put together. I feel impelled to pause here a moment to mention some of the facts of his great judicial career. He presided in the Court of King's Bench more than thirty years, and in all that time there were only two cases in which his opinion was not unanimously adopted by his brethren who sat on that bench with him, though they included some of the most eminent of English judges, Sir William Blackstone amongst them. Of the many thousand judgments he pronounced, two only were reversed. In all his thirty years' service as a judge, a bill of exceptions was never tendered to his direction, the parties either accepting his ruling or being entirely satisfied for him to state the questions to the court, and Dunning and Erskine, who had more practice almost than all the other lawyers, being opposed to him in politics. Lord Campbell says of him:

"Even the learned on the Continent of Europe, who had hitherto looked upon English lawyers as very contracted in their views of jurisprudence and had never regarded the decisions of our courts as settling any international questions, acknowledged that a great jurist had at last been raised up among us, and they placed his bust by the side of Grotius and D'Agueseau. In his own lifetime, and after he had only a few years worn his ermine, he acquired the designation by which he was afterwards known, and by which he will be called, when five hundred years hence, his tomb is shown in Westminster Abbey—that of "THE GREAT LORD MANSFIELD."

Lord Mansfield struck the keynote in his career of law reform in the case of Rex vs. Mayor, 1 Burr, 292. A maxim of the law had often been quoted as "boni judicis ampliari jurisdictionem." He said it was wrongly quoted—that the true quotation was "boni judicis ampliari justitiam"—it is the part of a good judge to spread justice, not his jurisdiction. He set himself to the task of modifying the elementary principles of the common law of England and adapting them to the actual conditions of the people, instead of having them struggling along under the influence and operation of general principles adopted by their ancestors when they were little better than savages.

The most serious difficulty that confronted him was the fact that personal property, under the influence of those ancient general principles, was loaded and handicapped by burdens and restrictions that denied the owners of it the ability to make the use of it necessary for its free and full enjoyment. Our semi-barbarous ancestors thought very little of personal property. Sir William Blackstone tells us in the twenty-fourth chapter of his Second Book that the lands and houses were constantly under their eye. Our ancestors considered them the only thing worth the serious attention of their laws—"who took all imaginable care in ascertaining the rights and directing the disposition of such property as they imagined to be lasting and which would answer to posterity the trouble and pains that their ancestors employed about them; but at the same time entertained a very low and contemptuous opinion of all personal estate, which they regarded as only a transient commodity. * * * Our ancient law books, which are founded upon the feudal provisions, do not, therefore, often condescend to regulate this species of property. There is not a chapter in Britton or the Mirror that can fairly be referred to this head, and the little that is to be found in Glanvill, Bracton and Fleta seems principally borrowed from the civilians." This is a most important thought to be borne in mind if this subject, in its elements, is to be correctly understood. It must be borne in mind that under the common law personal property was practically outlawed. There was no passage of title to personal property at the common law except by delivery of the goods or grant of title by deed.

The first advances made by personal property towards recognition by the law was when traders got the courts to recognize the transfer of bills of exchange, upon the custom of merchants. But after making this acknowledgement the common law balked and refused to recognize a transfer of promissory notes and it required an act of Parliament to make that valid. But even after this, intangible personal property only was benefited. Tangible personal property remained under all the handicap that the original common law had placed it under, and owners of it were deprived of its most valuable and important uses. To make tangible personal property as available to the people in their ordinary affairs as intangible personal property had become, was therefore one of the greatest ends towards which Lord Mansfield bent his incomparable powers.

As early as 1767, when he had been only eleven years upon the bench, he disclosed his plan for making personal property serve the useful purpose to man that it ought to serve and from which the common law had excluded it. In that year he declared in Wright vs. Campbell, 4 Burrow, 2046, that if the endorsee of a bill of lading sells the goods at sea to a bona fide purchaser, who has no knowledge that the shipper is unpaid and endorses to him the bill of lading, the purchaser will acquire a good title to the goods, which the unpaid shipper cannot dispute.

The case of Wright vs. Campbell, was not in shape to authorize a decision of this proposition as that what Lord Mansfield said was nothing more than his obiter dictum. But this dictum contains in its bosom the result of years of meditation and an advance in the evolution of our laws greater than that made by all else put together since the enactment of the statute of Anne making promissary notes negotiable. Those members of the bar who thought that the straight lines of the old common law should be kept running on in a logical direction, derided this announcement as another case in which the new chief justice was overthrowing English institutions by the introduction of equitable doctrines from the civil law. But the dictum stood there to bear golden fruit of the most abundant character in due time.

Lord Mansfield made no explanation of his dictum in Wright vs. Campbell and it is anticipating a little to explain here what subsequent events showed that he had in his mind, but for the sake of clearness I think the matter should be explained here. What he had in mind was this: A bill of lading is nothing but a written agreement by the master of the ship to deliver up the goods to the order of the shipper. When the shipper endorses the bill of lading over to another, that other has the order of the shipper on the master for the goods, and by the master's agreement he is bound to deliever the goods up to that endorsee. Now, in this transaction, there has really been no passage of the title of the shipper, either by symbolical delivery or in any other way, to the endorsee. But as the shipper has armed that endorsee with an apparent authority to represent to an innocent third party that he has a right to the goods, if he does make that representation, and a third party does buy the bill of lading from the endorsee, then it would be inequitable and unjust that the shipper should claim the goods against that third party, even though he has not been paid for his goods, for when one o ftwo innocent parties is to suffer, he must suffer who has caused the difficulty. There is no case, therefore, of a pasage of t hitle to the goods, but a case has arisen in which the court will hold the shipper equitably estopped to deny that the title to and possessio nof the goods have passed to the innocent third party who parted with his money upon the shipper's assurance that the endorsee was the owner of the goods. The reason of the case would, of course, equally clothe the first holder of the bill of lading with the title to the goods if it were inequitable that the shipper should claim them, and the holder of the document would be practically and in effect the owner of the goods. Since the first holder of a warehouse receipt is given power by it to present that he is the owner of the goods and thereby to deceive an innocent third party the law deemed the title to have passed to him.

This is what we call passage of title by equitable estoppel, and when Lord Mansfield's great creative genius laid the foundation for introducing this principle into our common law, he struck the shackles from personal property that that common law had fastened on it and placed it within the power of men to make a common sense and practical use of their tangible personal property, which, before that had been denied to them.

The idea as conceived by Lord Mansfield being now explained, there remains only to show its development and how it became incorporated into our system of laws.

Mr. Justice Buller (Buller's nisi prius) became, in Lord Mansfield's time, a most eminent judge of the Court of King's Bench and he was Lord Mansfield's pet, and, as one might say, his fils adoptif. In his old age it was the dearest wish of Lord Mansfield's heart that Buller should succeed him as chief justice. Buller had lived with him on terms of the greatest intimacy, he knew the whole scope of his great designs for the reform of our laws, and the dearest hope of Lord Mansfield's heart was that his mantle might fall upon Buller so that those great designs might be carried forward just as though he had been able to remain there. On account of physical infirmities he never attended court after 1786, though he obstinately refused to resign and remained chief justice for more than two years. It was perfectly well understood at the time that he held on to the office in the hope of forcing Buller's appointment as his successor.

In 1788 the great case of Lickbarrow vs. Mason, 2 T. Rep., 63, involving the question of the rights of an innocent endorsee of a bill of lading, came before the Court of King's Bench, Buller, Ashhurst and Grosse sitting, and Buller at the time being in daily intercourse with Lord Mansfield, who retained all of his mental faculties, and was still Chief Justice, though physical disabilities prevented his attending court.

The case was this: Turing and Son, of New Zealand, shipped a cargo of wheat upon the order of Freman, of Rotterdam, to Liverpool. The captain of the ship signed and delivered to Turing and Son three bills of lading, by which he agreed to deliver the goods at Liverpool to the order or assignees of Turing and Son, Turing and Son endorsed two of the bills over to Freeman, retaining the third, and drew on Freeman for the price of the cargo, which draft was accepted by Freeman. Freeman endorsed the bills of lading to Lickbarrow, at Liverpool, and drew on him for the value of the cargo, and Lickbarrow, having received the bills of lading, paid Freeman's draft, so that Freeman had come to owe Lickbarrow the price of the cargo upon the bills of lading received by him, properly endorsed to him. Meantime, Freeman became bankrupt and failed to pay Turing and Son's acceptance, and Turing and Son endorsed the bill of lading retained by them to Mason, at Liverpool, who presented it to the captain of the ship, and he delivered the wheat to Mason on Turing's account. Thereupon Lickbarrow sued Mason for the wheat, and the question to be determined was whether Lickbarrow, the bona-fide purchaser of the cargo, with the bills of lading properly endorsed to him, was to have the wheat, or Mason was to have it for the benefit of Turing and Son, the unpaid shippers. The Court of King's Bench held that Lickbarrow should have the wheat. Mr. Justice Buller used the following language in his opinion in the case:

"I beg leave to say that in all mercantile transactions, one great point to be kept uniformly in view is to make the circulation and negotiation of property as quick, as easy and as certain as possible."

In using this language he unlocked Lord Mansfield's mind and exhibited to us what that great judge had had in mind when he announced his opinion in Wright vs. Campbell. He had resolved to strike the common law shackels from tangible personal property, and put it within the power of the English people to make that use of their tangible personal property which their necessities and their convenience required.

Equitable estoppel was a phrase that had not come into use at the time that Lickbarrou vs Mason was decided, but though the phrase is nowhere used in the report of the case, the idea involved in pasage of title by equitable estoppel runs through the opinion of each judge. Thus, Asburst, J., says, "We may lay it down as a broad, general principle that whenever one or two innocent persons must suffer by acts of a third, he who has enabled such third person to occasion the loss, must sustain it. If that be so it will be a strong and leading clue to the decision of the present case."

The whole doctrine of passage of title byequitable estopped is stated here though the phrase is not used. The case settled then, as part of the common law, that a party who delivers a document of that sort passes title to his property upon the principles of equitable estoppel, and makes the holder of the document the practical owner of the goods, and thus Lord Mansfield's great conception was embodied in the common law to the unspeakable advantages of all English speaking people.

It was in this case that Mr. Justice Buller pronounced that exalted eulogy upon Lord Mansfield that has been so much admired. Speaking of the way in which he had modified the rigorous lines of the common law by weaving into them the equitable principles of the civil law, he said:

"We find in Snee vs. Prescott that Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but deciding upon all the circumstances of the case put together. Before that period we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged and explained, till we have been lost in admiration at the strength and stretch of the human understanding."

The principle was of such patent, practical advantage that it was at once accepted all over the civilized world, and has never been questioned since. But strange to say, the ratio decedendi was for a long time lost sight of, and learned courts continued to give parties the benefit of ownership of personal property thus conveyed to them upon the strange and absurd doctrine that there had been a passage of the title by symbolical delivery of the property, the document being the symbol. But some thirty or forty years ago the Court of Appeals of New York took the subject in hand in McNeil vs. National Bank, 46 N. Y., 325, and in a masterly opinion demonstrated that the title passes in such cases upon the principle of equitable estoppel, and not of symbolical delivery. Our Court of Appeals has unreservedly adopted this proposition as a part of the general law of the land in the Milhiser case, holding that it applies to warehouse receipts just as much as to bills of lading, both being the same in effect, and thereby converting tangible presonal property into available collateral at bank, and, in doing it, it has done a service to the people of Virginia that is beyond the power of estimation. Without this principle, only those men can borrow money at the banks for their business whose credit or bond and stock collaterals are sufficient to satisfy the banks of the safety of their loans. Without this principle the banks are accessible to the rich only. But with this principle every small manufacturer can turn his establishment into a warehouse and pledge his supplies and product for the money necessary to conduct and expand his business. The decision is of greater importance to the people of Richmond than the addition of ten millions of dollars to her banking capital would be without it. Without it ten millions of new capital would only make that much more that the rich could borrow. With it the present capital is wide open to the poor who have any personal property to put up as security.

The laborer, too, is as much interested as any one else in the decision. In enabling small manufactures to do business it increases the number of those who can employ labor and, though the supply men think that the supply lien law is for their advantage, they make a great mistake and they are also as much interested in the decision as any others.

Supply men do not sell upon the faith of the security that a supply lien statute gives them. They sell upon the credit of the party they sell to. When a merchant or manufacturer is in such bad credit that a person selling to him has to think of a statutory lien for his protection, he at once dismisses all thought of selling to that merchant or manufacturer, and, if he does sell to him because of the statute, he finds, when the manufacturer fails, that he has gone on just as far as he can go and has very little left, and that the supply man who has the oldest claim comes in and takes everything to the exclusion of all the others.

But the existence of a supply lien statute cut the manufacturer off from all chance of borrowing on his stock, and, therefore enormously diminishes the market for supplies. The statute, therefore, cuts the supply man off from making sales, and affords him no protection if there is a failure.

This paper is too long for me to enter into a critical examination of the supply lien act to show that there is nothing in it that forbade the court to come to the conclusion that it reached. The court actually decided in the case that there is nothing in the act that prevents it from holding that the delivery of a warehouse receipt is a complete transfer of the property, free from all incumbrances and it was the court's province to construe the act, and its construction of it is final. Suffice it, however, to say that the court has set a peg of justice and progress far in advance of the lines of the formalists and that after awhile these will march up to that peg and wonder how they could ever have hesitated as the English lawyers finally took off their hats to Lord Mansfield. As I understand the case the court meant to say in construing the act, that it will never understand that the Legislature intended to obliterate from our laws a principle of such prime vital and incalculable importance to the body of the people as the proposition relating to passage of title by equitable estoppel unless it is absolutely compelled to accept that conclusion, and, in my judgment, the people of Virginia should thank the court from the bottom of their hearts for having been able to see its way to reaching the conclusion that it did reach.

WM. L. ROYALL.

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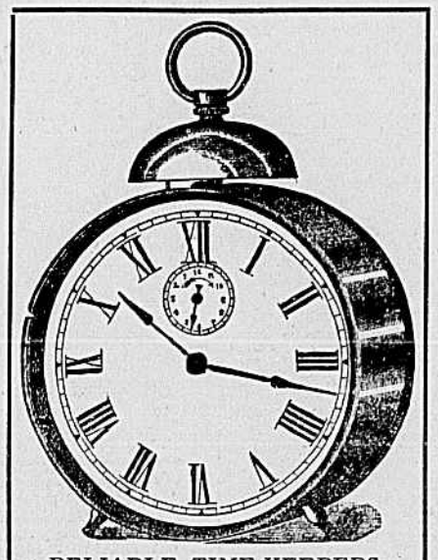

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In the Bottom of the River.

In the bottom of the river,
There are wonders there to-day,
The shells and rocks are scattered
Where the dead fishes lay;
The ships anchor near them,
But there is no sign
Of the wonders that lie there—
As grapes on a dead vine.
There is no one to disturb them
But the sounds of the deep,
But they are never, never disturbed
From their peaceful sleep;
A sunken ship lies near them,
Over which the fishes play,
The barn'cles have clinging
To its sides for many a day.

WATSON SHEPHERD.